Welcome to the Mediation Committee’s June 2018 e-Newsletter!

The ABA Section of Dispute Resolution’s Mediation Committee e-Newsletter is excited to share our June 2018 e-Newsletter. We are happy to report that the Mediation Committee has expanded to over 500 members, the largest committee in the ABA Dispute Resolution Section. We were also very pleased with the turnout at the Spring 2018 meeting, both at our business meeting and the dinner. It was a great opportunity to get to know our members as well as share information about current initiatives and new projects in the works.

This e-Newsletter consists of information on Recent Articles and Reports, Committee Members Profiles, Insights from in-house Counsel, Call for Volunteers for Sub-committee, Mediation Programs and Materials and Articles and Proposals for Just Resolutions Magazine.

We are looking for additional contributors to assist in the quarterly newsletter production as well as our other projects. Do you have some ideas on how to connect and grow our Committee? Want to know what’s going on with the Committee and its members? Looking to improve your practice? All of this and more is available by being involved with one or more of our sub-committees. Just write to let us know that you want to be involved! And don’t forget to check out our webpage for the latest in Committee news!

Mediation Committee Co-Chairs, Mark LeHockey and Joe Esposito

Newsletter Chair, Mansi Karol

RECENT ARTICLES / REPORTS

Creating Opportunities: “Diverse Neutrals” and ABA 113’s Impact on Young Lawyers and Law Students, by Andrea R. Johnson, co-chair of the Mediation Committee’s Young Lawyer Subcommittee. While we reported on Andrea Johnson’s article in our prior Newsletter, it is now available through this link: http://apps.americanbar.org/dch/committee.cfm?com=DR020500. The article addresses the important need to expand opportunities for diverse neutrals and ABA Resolution 113, a step in that direction.

PBGC’s Pilot Mediation Project, by Judith R. Starr¹

The Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571 et seq., encourages federal agencies to use alternative dispute resolution (ADR) in a variety of administrative settings. The

¹ General Counsel, Pension Benefit Guaranty Corporation and certified mediator. The views expressed herein are the author’s own and do not represent those of the PBGC or the U.S. Government. Judith also serves as co-chair of the Just Resolution subcommittee of our Committee.
Presidential Memorandum of May 1, 1998, established an Interagency Dispute Resolution Working Group to facilitate and encourage ADR use, and periodically report to the President on progress in this area. The Working Group’s most recent report to the President, [https://www.adr.gov/pdf/2016-adr-rpt.pdf](https://www.adr.gov/pdf/2016-adr-rpt.pdf), issued in January 2017, discussed the efficiencies and cost savings federal agencies realized from the use of ADR. Across the Federal Government, the savings in person-hours, time to resolution and litigation costs were substantial. The use of ADR in place of more adversarial litigation techniques also appeared to improve relations with agency stakeholders.

Although federal agencies most commonly use ADR for workplace and equal employment opportunity disputes, they also use ADR for disputes with regulated entities arising from specific agency missions. My agency, the Pension Benefit Guaranty Corporation, (PBGC), became interested in extending ADR to mission-related activities last year due to concerns we heard from stakeholders about the time and cost it took to resolve certain matters. PBGC insures defined benefit pension plans. Its activities include mitigating risks associated with underfunded plans by seeking protection for plans when they appear at risk and collecting statutory liability for underfunding from employers whose plans terminate and are assumed by PBGC. We wanted to create a pilot project to offer mediation in appropriate cases in these two categories and then review the results against predetermined benchmarks to determine next steps.

To create the Pilot, we reviewed guidance from the Interagency Dispute Resolution Working Group, benchmarked similar programs across the Federal Government, and spoke with knowledgeable officials. After crafting a charter for the Pilot, we obtained approval to go forward. We then entered into an interagency agreement with the Federal Mediation and Conciliation Service (FMCS) to supply mediators for the Pilot. The agency launched the Pilot with a press release and a project page on our website (pbgc.gov) in October 2017. It was well received across PBGC’s stakeholder community.

The goals of the Pilot are: to resolve disputes early, to promote improved relations with stakeholders, to reduce the costs of protracted negotiations and other proceedings, and to make ADR an integral part of the agency’s dispute resolution process. PBGC will screen cases and offer mediation to respondents after certain information disclosures are completed, unless the plan sponsor has a limited ability to pay, a court proceeding is pending, or there is limited time to act and the plan sponsor is unwilling to sign a standstill or tolling agreement. Participation in mediation is voluntary on the part of the plan sponsor; PBGC will participate in any case where mediation is offered and accepted.

Plan sponsors are entitled to participate with or through the representative of their choice. PBGC case team members will participate on behalf of PBGC and will be trained in mediation practice. As noted above, mediators will be supplied by FMCS.

After the program has been operating for one year, PBGC will evaluate the project’s success according to the following metrics, and include plan sponsor feedback as part of the evaluation:

- Percent of screened cases found eligible to participate
- Percent of eligible cases opting for mediation
- Resolution rate – impact on case inventory
- Time to resolution
- Cost savings vs. litigation or protracted negotiations
• Outside stakeholder reaction to pilot – impact on stakeholder relationships.

We have screened our first batch of cases and are about to embark on our first mediation. I am hopeful that the Pilot will foster a new way to engage with the agency. I look forward to sharing the results next year.


In 2013, an angry mediation participant shot opposing counsel and the client he was representing outside a Phoenix law firm. In response to this double homicide, the Association for Conflict Resolution established a task force to study and make recommendations on how best to promote the safety of ADR practitioners and participants. These recommendations outline how to prepare, what to ask, and what to do to care for yourself and your clients in the most dangerous of circumstances. They were created to meet the needs of a complex and wide-ranging ADR practice and are ideal for those in solo practice or responsible for ADR programs. They discuss overall safety protocols, working with individual disputants and what to do in case of actual or threatened violence. The Report, which has been submitted to the DR Section Leadership for endorsement, is available through Stephen Kotev’s website: [http://www.stephenkotev.com/resources/](http://www.stephenkotev.com/resources/)

**MEET OUR COMMITTEE MEMBERS**

Judith Starr

• Where are you located are and what do you do?
  I live in Alexandria Virginia. I am the general counsel of the federal agency that insures defined benefit pensions, the PBGC.

• How did you become involved with mediation?
  I am a relative newcomer to the neutral side of mediation although much experienced as an agency rep. In 2014 I took a week-long mediation class at the Federal Mediation and Conciliation Service and it just drew me in. I now serve as a collateral duty mediator with the Federal Sharing Neutrals program, mediating workplace disputes across the
Federal Government, when I’m not general counseling. I also am certified as a mediator in Virginia and recently was selected to be a FINRA arbitrator.

• How are you currently involved in the ABA's Mediation Committee?
  I recently joined the Dispute Resolution Section, attended the Spring meeting in Washington, D.C., and will now be co-chairing the Mediation Committee's *Just Resolution Magazine* contribution. Our Committee's issue is earmarked for the Spring of 2019. Look for more information soon about the opportunity to propose articles for our issue.

• Care to share any memorable mediation story -- really good or really not?
  Worst mediation ever— complainant brought a “business rep”who turned out to be not only a disbarred lawyer but a convicted felon. It did not go well and I ended it rather quickly. Sometimes mediation is not going to work and you need to just move on.

• Favorite activities when you are not working?
  I love to read, run, do yoga, cook, do crosswords and hang with my family.

• Favorite movie, music or play?
  Leonard Cohen’s Hallelujah and Dvorak’s Ninth Symphony are my desert island fallbacks.

• What do you hope to get out of participating in the Committee (besides recommendations for movies, music and plays)?
  I already am learning so much from other members, exactly as I had hoped. There is so much going on in our practice it is exciting to be plugged in to follow its evolution.

**Edd McDevitt**

• Where you located are and what do you do?

- How did you become involved with mediation?
  When I got out of law school I first practiced in Philadelphia. The Court of Common Pleas has a mandatory arbitration system for certain cases. This exposed me to what we now call ADR. I liked the expedited nature of the process. Years later, when the Southern District of West Virginia initiated mediation, I was appointed to the first panel. Working as both a mediator and an advocate, I quickly saw the potential benefits of the process. I also found it fairer and more enjoyable than the old “head banging” system of how judges settled cases.

- How are you currently involved with ABA’s Mediation Committee?
  I believe that I am a “poster boy” for how open, accepting and inclusive our Section and the Mediation Committee are. I joined the DR Section and the Mediation Committee in the summer of 2014. Since then I have attended two (2) Spring Meetings and three (3) Institutes. While attending these events, I have been fortunate to meet a number of talented and interesting folks from all over the country. This past fall I was given the opportunity to co-chair the Advocacy and Continuing Education/Webinar subcommittees. Currently, I have the privilege and opportunity of being a member of the planning committee for the 2018 Advanced Mediation & Advocacy Skills Training Institute set for Chicago on October 18 and 19.

- Any memorable mediation story where things went really well (or in the other direction) and why?
  Early in tenure as a mediator for the Southern District of West Virginia I handled a couple of cases involving serologist Fred Zain. Mr. Zain performed lab work and testified in numerous cases in West Virginia and later Texas. He was a prosecutor’s dream on the witness stand. The problem was, Mr. Zain falsified and made up “lots and lots” of his scientific findings and a number of innocent citizens spent many years in prison for crimes they didn’t commit. Hearing the stories of the impact Zain had on the lives of the wrongly convicted individuals and their families really brought home just how stacked the criminal justice system is in favor of the prosecution (this opinion notwithstanding the fact I had tried a fair number of criminal cases as a young lawyer).

- Favorite activities when you are not working?
  I love to read mystery and spy novels (Daniel Silva is my personal favorite) and books on early American history, largely pre-1740.

- Favorite movie, music or play (not opera please)?
  My favorite music is rock and roll and the “harmony” songs of the 1950s and 60s. My favorite artists are The Ink Spots, Fats Domino, Righteous Brothers and I can listen without end to the blues singer Marci Ball. I really enjoy action movies but my all-time favorite is The American President; it’s just a fun and make-you-smile escape.
What do you hope to get out of participating in the Committee (besides recommendations for movies, music and plays)?

With our Committee and Section I get to meet exceptionally nice and intelligent folks who share their skills and help me to improve my efforts when I provide mediation services. I hope that in some way that I too contribute to the learning experience of others.

INSIGHTS FROM IN-HOUSE COUNSEL:

Thomas Knapp

Mr. Knapp has over 25 years of corporate and large legal firm experience with regulated industries, with experience including Federal and State regulatory matters, Federal government affairs, risk management, compliance, litigation, complex commercial transactions, and corporate governance. Mr. Knapp is currently a consultant for SELLAS Life Sciences Group, Inc. f/k/a Galena Biopharma, Inc., where he was the Interim General Counsel and Corporate Secretary with Galena Biopharma, Inc., prior to which his experience includes serving as EVP, Chief Legal Officer, and Corporate Secretary of Sucampo Pharmaceuticals, Inc., as Vice President, General Counsel and Corporate Secretary at NorthWestern Corporation, and in senior in-house attorney positions at The Boeing Company and The Burlington Northern & Santa Fe Railway Company. Thomas J. Knapp was elected to the Board of Directors of Osiris Therapeutics, Inc. in February 2017.

What do you and your counsel look for when selecting a mediator?
Experience in the subject matter, availability, experience with opposing party and counsel, fit with type of arbitration to be conducted

What is your selection process?
It depends on the selection process in the mediation agreement or the particular rules that are being used.
What aspects of the mediation process are most effective in your cases? Unfortunately, it varies with the cases but in general the selection of the mediator.

At what stage of a case have you found mediation to be most effective (e.g., pre-discovery, post-discovery)? Post-some type of discovery be it voluntary disclosures or full blown discovery.

Which of your company’s cases are the best candidates for mediation? Derivative and securities class action cases.

What qualities do you most admire in a mediator? The ability to understand the issues in a way to communicate the each party the good and bad points of their positions.

What qualities do you look for in your outside counsel during mediation? Experience with mediation in the type of cases that will be mediated, familiarity with the list of mediators or mediator to be selected, ability to communicate to client the good and bad aspects of the case so that the client can decide if it wishes to resolve the matter or not.

What qualities in a mediator rub you the wrong way? Handling other cases at the same time he/she is handling my case, not understanding the case and the dynamics at play with each party.

What style of mediation was most effective or memorable to you? The one that resolved the case.

What advice would you give counsel so that they may effectively represent their clients during mediation? Know the mediator, understand the other party and its counsel and pay attention to the dynamic in the room as the mediation progresses during the day.

What advice would you give mediators? Pay close attention to what I dub the Hart Rules of Mediation - know each party inside and out including what happened to that party prior to arriving to the mediation.

CALL FOR VOLUNTEERS FOR SUB-COMMITTEE’S

If you are interested in becoming more active in the Mediation Committee, please consider volunteering for one of our subcommittees. Please contact Mark LeHockey at mark@marklehockey.com and Joe Esposito at jesposito@hunton.com to let us know your interests.
MEDIATION PROGRAMS AND MATERIALS

How to Improve Your Mediation Advocacy in Employment Litigation

This June 7, 2018 webinar, co-sponsored by the Bar Association of San Francisco, the ABA Employment Law and Dispute Resolution Sections, among others, is available for purchase at http://www.sfbar.org/calendar/eventdetail.aspx?id=G184104/G184104

Mediation Strategy and Preparation: Horror Stories and a Map for Success

This June 6, 2018 CLE program, co-sponsored by the Contra Costa County (California) Bar Association’s ADR and Litigation Sections, was not recorded. However, anyone interested in the underlying materials should contact Mark LeHocky at mark@marklehocky.com.

JUST RESOLUTIONS MAGAZINE: ARTICLE PROPOSALS REQUESTED

Interested in writing about Certification of Mediators / Regulation of the Mediation Profession – Status, Trends and Issues? The Mediation Committee is editing the March 2019 Edition of Just Resolutions and welcomes submissions on this subject.

We are looking for articles about how mediators are currently certified and/or regulated at the state and federal level, including both qualification requirements and ethics. We are also interested in articles discussing current trends in mediation regulation and mediator certification, particularly with implications for multijurisdictional practice. Finally, we are interested in opinion pieces on current issues such as reciprocity, national and/or international standards, etc.

Please submit article proposals to Judith Starr at Starr.Judith@pbgc.gov on or before July 30, 2018. Your proposal will be reviewed and responded to promptly. If you already have a piece written, please submit a summary as your proposal, not the full piece.

Initial drafts of articles will be due on or before September 28, 2018. Articles in Just Resolutions are 750-1000 words; longer pieces should be submitted to other publications.

Stay tuned for the Fall e-Newsletter.

Mansi Karol

Fellow, Kukin Program of Conflict Resolution, Benjamin N. Cardozo School of Law (Summer 2017)
LL.M. Benjamin N. Cardozo School of Law, 2017
LL.M. Queen Mary University of London 2011
LL.B. Bangalore University, India 2010